

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1109 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

BHURABHAI HIRABHAI NINAMA

Versus

STATE OF GUJARAT

Appearance:

MR PJ YAGNIK for Petitioner
PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

Date of decision: 01/07/98

ORAL JUDGEMENT

(PER BHATT,J)

1. The appellant-original accused came to be tried along with three other accused persons for the charge of offence punishable under sections 302 and 203 IPC. in a

Sessions Case No.47/91 before the Ld.Addl.Sessions Judge, Panch Mahals at Godhra for which he is held guilty for offences punishable under section 302 IPC as he is found to have committed murder of his wife deceased-Mangu, aged 20. The original accused Nos 2,3&4 who were charged for having committed offence punishable under section 302 read with section 114 IPC by the trial court came to be acquitted. Unfortunately, no order is passed with regard to the charge under section 203 IPC. The appellant-accused No.1 has, therefore, questioned the legality and validity of his conviction under section 302 IPC and resultant sentence for Life Imprisonment by filing this appeal.

2. Short and simple resume of the salient aspects of the prosecution case may initially be articulated at this stage. The prosecution, interalia, contended that the appellant was charged for murder of his wife-Mangu on 6.11.1990 at about 5.00 p.m.in his house at village Nada of Taluka Sahera of Panch Mahals district. The appellant is hereinafter referred to as "the accused" for the sake of brevity and convenience. The accused and his wife were residing at village Nada in a house which is the venue of offence.

3. The prosecution case is that the accused on the day of incident in the evening at 5 started beating his wife. He inflicted kick blows and thereafter throwing her on the ground kneeling down on her body , pressing her throat and compressing the chest portion caused serious injuries which were sufficient in the nature in order to cause death. The deceased and the accused entered into matrimony three years prior to the date of incident. The motive is also ascribed for the commission of offence in question. The accused had an illicit relation with the wife of his brother--Rumalbhainai--Origianl Accused No.4.

4. The defence plea of alibi has not been accepted by the trial court. In that it was contended on behalf of the defence that the accused and other family members except deceased Mangu had gone to participate in a wedding ceremony at village Dhandhalpur two days prior to the occurrence of the incident leaving Bai Mangu as she was ailing. That defence of the accused was of total denial. The prosecution has also mentioned that the accused No.1-appellant herein and accused No.4--Rumalbhai are the brothers and original accused No.2--Akhamhai and accused No.3--Shankalbhai are brothers and were cousins of accused Nos 1 & 4.

5. In order to appreciate the charges against the accused persons prosecution placed reliance on the oral evidence of following 9 witnesses:

- (i) Prabhatsinh Kanakabhai,
- (ii) Kuberbhai Ramabhai,
- (iii) Gambhirsinh Chhaturbhai,
- (iv) Dr.B.P.Itale,
- (v) Bharatbhai Parsinghbhai,
- (vi) Champaben Parsinghbhai,
- (vii) Hirabhai Vadhabhai,
- (viii) Akhamben Hirabhai,
- (ix) V.M.Pargi,

The prosecution also placed reliance on the following documentary evidence:

- (i) Inquest Panchnama,
- (ii) Panchnama of the scene of offence,
- (iii) Search and arrest panchnama of the accused,
- (iv) Panchnama of cloths on the dead body
- (v) Post Mortem notes,
- (vi) FIR of the Sarpanch of village Nada.

6. The Ld.Addl.Sessions Judge, upon the prosecution evidence and appraisal of the facts emerging from the record of the case found in clear terms that it was accused and nobody else who was the author of the crime and responsible for the murder of his wife-Bai Mangu, aged 20. The plea of alibi was not accepted by the trial court. The conduct of the accused was also noticed by the trial court as inconsistent. The case of the prosecution was found to be fully reinforced by the medical evidence. However, no offence was successfully established beyond reasonable doubt insofar as the original accused Nos 2, 3 and 4 are concerned. Therefore, all of them came to be acquitted of the said charges, whereas the trial court has clearly found the complicity of accused-appellant herein for the offence punishable under section 302 IPC has been successfully established without any shadow of doubt and therefore the trial court sentenced him to undergo imprisonment for life.

7. We have dispassionately examined the entire testimonial documents and the documentary evidence to which reference to be made by us as and when required at an appropriate stage hereinafter, and have also heard the Ld.advocate appointed for the appellant-accused and the Ld.APP.

8. It may be stated at this stage that this is a case of circumstantial evidence. There is no evidence to compaginate the accused with the complicity he is charged. The trial court has placed reliance on various circumstances which according to the trial court were forming complete chain of circumstances indicating and pointing out unerringly the culpability of the accused and nobody else and held him guilty for offences punishable under section 302 IPC and sentenced him to undergo imprisonment for life. We have also threadbare examined the circumstances relied on by the prosecution and accepted by the trial court for basing the conviction against the accused.

9. We are conscious of the fact that in cases like one on hand when the circumstantial evidence is sought to be relied on for proving the guilt of the accused, the circumstances should be shown which would definitely and unerringly point out the culpability of the offender.

10. In fact it is one of the established principles of law that a witness may lie but not the circumstance. Nevertheless, the court ought to adopt a cautious approach while basing its conviction simply and purely on circumstantial evidence. As evidence, there is no difference between direct and circumstantial evidence. The only difference is in that an extent of proof of degree of authenticity. In fact, the only difference is in that as proof, the former directly establishes the commission of the offence whereas the later does so by placing circumstances which led to irrestible inference of complicity. The standard of proof required to convict a person on circumstantial evidence is very well explored and very much expounded by series of decisions of the Honourable Apex Court and various High Courts.

11. According to settled principles of law, the standard of proving circumstances relied upon by the prosecution in support of conviction of the accused so as to be fully satisfied and established thechain of evidence furnished by those circumstances must be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it ought to be shown that within all human probability it must have been done by the accused and nobody else.

12. It may also be recalled and stated at this stage that it is not the proposition that before the prosecution could succeed in a case resting upon circumstantial evidence alone, it must meet any and every

hypothesis suggested by the accused, however extravagant and fanciful it might be. What is required to be established by the prosecution shall be the guilt of the accused to show from the evidence on record that the chain is so complete and that it points unerringly the guilt of the accused and nobody else.

13. Again, it is not necessary that every one of the proved facts must in itself be decisive of the culpability of the offender or point conclusively of his guilt. In short, therefore, when deciding the question of sufficiency, what the court has to consider is the total cumulative effect of all the proved aspects from the record of the case and each one of which reinforces the conclusion of guilt.

14. It is the basic tenet of criminal jurisprudence that if two views are possible on the evidence emerging from the record of the case, in a case of circumstantial evidence, one connecting to the culpability of the accused and the other to his innocence, the court ought to adopt the view favourable to the accused. It, therefore, becomes crystal clear that in order to succeed to compaginate the accused with the complicity he is charged with it is incumbent upon the prosecution to lead the circumstantial evidence of such nature, degree and extent that it must complete the chain of circumstances which would unequivocally establish the guilt of the accused and nobody else.

15. The Honourable Supreme Court has, time and again, dealt with cases of circumstantial evidence and has laid down the guidelines. In reference to the cases where there is no direct evidence the verdict has to be rendered on circumstantial evidence, and such evidence must satisfy the following tests as propounded by the Honourable Supreme Court in series of decisions:

- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.
- (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else;

(iv) the circumstantial evidence in order to sustain conviction must be incapable of explanation on any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

16. It can very well be visualised that it is incumbent upon the prosecution in a case of circumstantial evidence to prove the culpability of the accused charged by leading circumstantial evidence the chain of which should be so complete without any missing link which would undoubtedly connect the criminality of the accused and nobody else. Since the conviction of the appellant is based on circumstantial evidence in the present case the evidence has to be scanned and scrutinised in the light of aforesaid proposition of law and guidelines laid down in number of decisions.

17. After having read extensively the evidence on record the following aspects have remained unimpeachable:

(i) The deceased-Bai Mangu who was aged 20 years, in other words, who was in the prime of her youth, entered into matrimony with the accused three years prior to the unfortunate incident which culminated into her death.

(ii) The deceased-Bai Mangu as the house-wife was living in the house of husband-accused along with other members of the family.

(iii) The accused and other members of the family went to attend a wedding ceremony leaving Bai Mangu--the deceased alone and ailing in the house.

(iv) That the relationship between the spouses was strained. They just pulled on without matrimonial bliss as the accused-husband was in illicit relationship with the wife of his brother--original accused No.4-Rumalbhai

(v) The Medical evidence of Dr.Itale at Exh.23 fully supports the prosecution version. The cause of the death was due to asphyxia which was the result of throattling and internal haemorrhage due to rupture of spleen and positively in case of T.B. as alleged by the defence.

(vi) There were sufficient marks of injuries on the body of the deceased and also internal injuries as per the Post Mortem report produced at Exh.18 which fully supports the case of prosecution.

18. It is also very clear from the medical evidence that the time and period of death was co-related and was referable to the time and period during which the accused-appellant remained with the deceased in his house. This important circumstance was rightly relied on by the Ld.Addl.Sessions Judge.

19. Again, the conduct of the accused who happened to be the husband of the deceased by itself incriminating the circumstances. What will be the natural and spontaneous reaction of the husband whose wife has died due to ailment as alleged ? An innocent husband would undoubtedly not be interested to arrange for the cremation of the deceased who became the victim of unfortunate serious crime. As such he would act like an innocent person and is first informing the close relatives of the deceased.

20. It is noticed successfully by us from the evidence and set of circumstances that the accused not only concealed the real cause of the death, but tried to give a different color and false excuse therein whose wife has succumbed to the ailment of TB. The marks of injuries on the body, the internal injuries as noticed by the doctor upon autopsy which were sufficient in ordinary course of nature to cause death and diametrically opposite to the defence that the death was due to TB.

21. The plea of alibi propounded by the accused has not been shown as reasonably probable even by preponderance of evidence on record.

22. The plea of alibi is required to be proved by the person who raises it. Of course the degree and standard of proof may not be same as that of proving the guilt of the accused. It could also be successfully established upon the preponderance of probabilities. We have no hesitation in finding that the trial judge has rightly rejected the false plea of alibi.

23. The plea of alibi is referable to the provisions of the Indian Evidence Act. We may, therefore, refer to some relevant provisions. In Chapter VII-Part III of Indian Evidence Act Sections 101 to 114 A are prescribed in connection with the burden of proof. Section 101 of

the Evidence Act clearly provides that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. The plea of alibi is a question of fact and it was within the special knowledge of the offender. Therefore, it has to be established by the accused and the burden of proof lies on him. No doubt it is right that whereas under section 101 of the Evidence Act the legal obligation of the prosecution is to prove its case beyond reasonable doubt and the obligation of the accused under section 105 of the Indian Evidence Act is to only to show by preponderance of probability that his case may be true. It is therefore clear that the burden on the prosecution to establish the guilt of the accused in its case "must be true". Therefore, when the plea of alibi is raised the defence could show it even in the absence of leading any evidence from the other evidence on record on preponderance of probabilities.

24. Section 102 of the Evidence Act prescribes that burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. It is essential in connection with civil dispute.

25. We are vitally concerned with the provisions of section 103 of the Act which prescribes that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Therefore, if the accused wishes the court to believe that at the time in question he was not at the venue of offence but he was somewhere else. It is he who must establish it, of course, upon preponderance of probabilities yardstick.

26. Where the accused raises the defence by way of alibi (his presence elsewhere) the burden undoubtedly lies on him to substantiate that fact, atleast to the extent of reasonable probability. Even if the evidence produced is very much of creating doubt whether the accused was there or not at the time of happening of unfortunate crime or incident he would obviously become entitled to benefit of doubt. The plea of alibi has got to be established to the satisfaction of the court. It is for the accused to show that the defence of alibi is probable and reasonable. It is therefore clear that the burden of substantiating such a defence of alibi and making it reasonably probable is upon the accused.

27. In the light of aforesaid legal settings and in the background of factual scenario emerging from the record of the present case we have no hesitation in holding that the plea of alibi propounded by the accused in his defence is rightly held to be false and not reliable. It has not been successfully shown from the record of the case and even in the course of submissions before us that the plea of alibi even upon preponderance of probabilities is just and acceptable. We are in complete agreement with the trial court that the plea of alibi propounded by the accused in defence was false with a view to get out from the serious offence and capital charge.

28. It may also be mentioned that the evidence of PW 1 Sarpanch Prabhatsinh at Exh.19 fully corroborate the version of the prosecution. It was he who prevented the accused from destroying the evidence of serious offence of murder by obstructing to the cremation rituals. He prevented the accused upon finding that there were many marks of injuries on the chest, face and on the neck of the deceased. After he was informed of the unfortunate death of Bai Mangu he lodged a complaint on 8.11.1990 at 9.30 p.m. which is produced at Exh.20 and which is rightly relied upon the trial court. It is clearly found from the said FIR that the relationship between the spouses was not happy. It is also very clear from the said complaint that the deceased Bai Mangu had not died on account of any ailment or sickness. That the Sarpanch had serious doubt as he smelt commission of crime of murder and lodged a complaint at the earliest point of time. No doubt, the incident occurred on 6.11.1990 at 5.00 p.m. and FIR came to be lodged at 9.30 pm on 8.11.1990. The prosecution, however, has successfully explained the delay in lodging the FIR . It is rightly observed that after committing the serious offence of murder of his wife the accused had run away on 7.11.1990 and the parents of the deceased doubted that the deceased was done away with by the accused and there was serious doubt about the incident as a result of which this witness who is a Sarpanch of the said village prevented the completion of cremation of the dead body and lodged a complaint. Upon investigation and at the post mortem it was found that the death was not due to any ailment, sickness much less due to TB but it was on account of asphyxia which was the result of throttling and internal haemorrhage due to rupture of spleen. It is very clear from the medical evidence that there was a fracture of ribs and lungs of the deceased and it must have happened on account of compression which resulted into rupture of spleen because the pointed parts of the broken ribs

penetrated the spleen. That is how the investigation also found that there was a case for charge of murder and a Sessions Case No.47/91 was tried by the Ld.Addl.Sessions Judge, Panch Mahals at Godhra, who has, as stated hereinabove, rightly found the accused guilty for commissioning of crime in question.

29. We have no hesitation in finding that the accused is rightly held guilty for the homicidal death of his wife. However, the question which now falls for our consideration is as to whether in the facts and circumstances of the case the conviction of the accused under section 302 IPC is fully justified. Upon the assessment of the totality of the facts and circumstances, our spontaneous reply would be in the negative. In order to succeed to bring home and compaginate the accused with the culpability of the offence punishable under section 302 IPC the prosecution must show, from the facts and circumstances of the case, and the evidence on record, that there was intention to commit murder or to cause such injuries which in ordinary course and nature would cause death. The prosecution has not been successful in showing that there was intention of the accused to commit murder of Bai Mangu. It is true that there was bad blood between the spouses. It is equally true that there was unhappiness between the spouses on account of previous incident of intimacy of the accused with the wife of his brother. However, we can not be oblivious of the fact that there is a clear evidence on the record to show that the deceased Bai Mangu was brought to the matrimonial home after settlement and thereafter the spouses were living without quarrel, if not enjoying the marital bliss. Even from the manner and mode in which the injuries appears to have been caused it could safely be inferred that there was no intention to kill. Had the accused entertained the animus to finish his wife, he would not have resorted to give only blows and thereafter would not have attempted to suffocate her. There are doubtful circumstances and the benefit of doubt in so far as the inference of intention to kill is concerned must go to the accused and against the prosecution. We are, therefore, of the opinion that this is a case of homicide not amounting to murder as there was no intention to cause the injuries as sustained by the deceased. That at the most, the accused could be attributed with the knowledge that such injuries are likely in the ordinary course of nature to cause death.

30. Culpable homicide as prescribed under Chapter XVI and section 299 of IPC reads as under:

"Sec.299:

"Culpable Homicide--Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely by such act to cause death, commits the offence of culpable homicide."

31. It may very well be seen from the aforesaid provision that in so far as Section 299 of IPC is concerned, causing bodily injury in such circumstances as enumerated in Explanations 1 & 2 is also culpable homicide.

32. Section 300- IPC provides the essentials of the offence of murder. Except in the cases covered by such exceptions, the culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death.

33. We are unable to reach a positive conclusion without doubt that the accused had entertained an intention to murder his wife. It may also be mentioned that the motive of murder and conduct of absconding ipso facto would not positively and definitely in the absence of other circumstances lead to a conclusion that the accused had entertained an intention to kill. Absconding of the accused may be for a variety of reasons. No doubt it is one of the incriminating circumstances if it is prompted to conceal the offence of murder. Section 302 provides punishment for murder. Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine. The trial court has found the accused guilty for the offence punishable under section 302 IPC only and has not passed any order with regard to the charge under section 203. The view and conclusion of the trial court for holding the offence committed by the accused of killing his wife is a culpable homicide amounting to murder could not be accepted without any doubt. However, we have no hesitation in finding without any shadow of doubt that the accused is guilty for the offence punishable under section 304 Part II. Section 304 provides for punishment for culpable homicide not amounting to murder. The first part deals with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be withfine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death. Whereas the second part deals with sentence of imprisonment of either description for a term which

may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

34. Therefore, the question is what should be the quantum of punishment which could be imposed on the accused under the provisions of Section 304 Part-II.

35. It has been stated at bar that the accused has already served sentence of imprisonment for more than 7 years. The incident was of the year 1990. Taking into consideration the overall picture emerging from the record of the present case, the ends of justice would be met if the imprisonment undergone by the accused is taken as adequate and sufficient. Therefore, we are of the opinion that in the facts and circumstances of the case while holding the accused guilty for the offence punishable under section 304 Part-II, instead of under section 302 from which he stands acquitted, the period of sentence of imprisonment undergone by the accused is sufficient instead of imposing maximum imprisonment of ten years. Payment of fine of Rs.500/- shall also be sufficient in the present case and with the result the order of fine of Rs.500/and in default Rigorous Imprisonment for three months remains unchanged.

36. Before parting we can not resist temptation to say that the Ld.Addl.Sessions Judge had lost sight of the charge of Section 203 IPC while imposing sentence. There is no mention in the order or any discussion about the penalty with regard to the charge under section 203 IPC presumably since the alleged person of offence disappeared and could not be completed as the Sarpanch intervened timely and did not allow the accused and his party to observe the rituals in respect of dead body of deceased Bai Mangu. We therefore find that the accused is required to be acquitted from the said charge. Therefore while partly allowing this appeal it is observed that the appellant-accused shall stand acquitted of the charge under section 203 IPC by exercising our powers under section 386 of Cr.P.C.

37. In view of the facts and circumstances enumerated hereinbefore emerging from the record of the present case and considering the relevant propositions of law discussed hereinbefore and after having given our anxious thought to the submissions msde before us the conviction of the appellant-Original accused No.1 for the offence punishable under section 302 IPC and resultant sentence of life is quashed and set aside and is substituted by

section 304 Paret-II by holding that the appellant-Original Accused No.1 guilty for the offence punishable under section 304 Part-II IPC and sentencing him with imprisonment the period he has already undergone with same amount of fine imposed by the trial court. Appeal accordingly shall stand partly allowed. Appellant therefore shall be released forthwith if not required in another case.

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